BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD LUNDRY	)	
Claimant	)	
VS.	)	
	)	Docket No. 166,389
THE BOEING COMPANY	)	
Respondent	)	
AND	)	
	)	
AETNA CASUALTY & SURETY	)	
Insurance Carrier	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Claimant appeals from a Review and Modification Award entered November 6, 1996, and the Order Nunc Pro Tunc entered January 27, 1997, both by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on April 9, 1997.

APPEARANCES

Gary K. Jones of Wichita, Kansas, appeared for claimant. Frederick L. Haag of Wichita, Kansas, appeared on behalf of respondent and its insurance carrier. Kurt W. Ratzlaff of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The record consists of the record considered as a part of the original Award entered in this case on July 8, 1994, and modified by the Appeals Board on February 29, 1996. The record also includes a transcript of the hearing held on July 25, 1996, to consider the Application for Review and Modification, and the transcript of the deposition of Mark Mason taken August 20, 1996. There were no new stipulations in the review and modification proceedings.

ISSUES

Claimant identifies the following issues:

(1) Nature and extent of disability.

(2) The application of Romeo v. Smith Temporary Services, Docket No. 184,711.

(3) Whether the presumption of no work disability should apply.

(4) Claimant's attorney fees.

(5) The effective date of any modification.

(6) Average weekly wage.

(7) Whether the Nunc Pro Tunc Order prepared ex parte by respondent is effective against claimant.

The Kansas Workers Compensation Fund asks for review of the order for the Fund to reimburse respondent for overpayments prior to the review and modification.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes that the Award by the Administrative Law Judge should be modified. As modified, claimant should be entitled to benefits based upon a 6 percent permanent partial general disability and the average weekly wage should be modified to $748.70. This modification should date back only six months prior to the filing of respondent's Application for Review and Modification.

The original Award entered in this case awarded benefits for bilateral carpal tunnel syndrome with a date of accident of April 15, 1992. The Appeals Board awarded benefits

for 6 percent permanent partial functional impairment for the period April 15, 1992, through May 11, 1993, during which claimant continued to work for respondent at a comparable wage. As of May 12, 1993, claimant was laid off and the Appeals Board awarded benefits beginning May 12, 1993, based on a 63 percent work disability.

On August 9, 1994, while the case was pending on appeal to the Appeals Board, claimant returned to work for respondent at a comparable wage. This fact apparently was not brought to the attention of those dealing with claimant's workers compensation issues for respondent until sometime later. Respondent filed an Application for Review and Modification on June 26, 1996, requesting that the Award be reduced. A hearing was held before the Administrative Law Judge on July 25, 1996, to define the issues. When no stipulations could be entered, respondent took the deposition testimony of Mark Mason to establish claimant's return to work and the amount of his wage.

The issues will be discussed in the order listed above.

(1) Nature and extent of disability.

The Appeals Board agrees with and affirms the conclusion that the award should be reduced to one based upon a 6 percent permanent partial disability. The original Award found claimant's functional impairment to be 6 percent to the body as a whole. That finding was not addressed by any of the evidence presented on review and modification. The dispute relates, instead, to whether the Award should be reduced to the functional impairment or, whether claimant remains entitled to a work disability. For the reasons discussed below, the Appeals Board concludes claimant does not remain entitled to a work disability and the award, therefore, should be reduced to the 6 percent disability based upon the functional impairment.

(2) The application of Romeo v. Smith Temporary Services, Docket No. 184,711.

In the Review and Modification Award, the Administrative Law Judge terminated benefits after recomputing the benefits based on Romeo v. Smith Temporary Services, Docket No. 184,711. At the time of the hearing before the Appeals Board, respondent agreed with claimant's contention that the Romeo decision has no application here. The Romeo decision relates to review and modification calculations under the statutory amendments which became effective July 1, 1993. Claimant's date of accident was in 1992. Under the Romeo decision, a review and modification which reduces the award to one based upon functional impairment may act to immediately terminate any further benefits because the new act calculations determine the number of weeks benefits are to be paid. Under the old act (pre-July 1, 1993) applicable here, the benefits for general body disability are to be paid for a full 415 weeks. A change in the percentage of disability reduces the amount of the payment made over those weeks, not the number of weeks

benefits are paid. Accordingly, in this case, the reduction to a 6 percent disability reduces the amount of the weekly payment for what remains of the 415 weeks.

(3) Whether the presumption of no work disability should apply.

Claimant acknowledges he is now earning more per week than he was at the time of the injury in this case. He, nevertheless, argues that the presumption of no work disability has been overcome. He contends the opinions of vocational experts Jerry Hardin and Karen Terrill overcome the presumption. Both testified to claimant's loss of ability to earn a comparable wage and loss of ability to obtain employment in the open labor market.

The Appeals Board finds the presumption should apply. The claimant is employed at a comparable wage. The theoretical loss of ability does not, as a practical matter, have any significance at this time. The presumption may be overcome by evidence that the job is temporary or the injury progressive so that the injury and loss of ability will likely have a medical significance. Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738, rev. denied 253 Kan. 859 (1993). There is no such evidence in this case, and the Appeals Board finds that the opinions of vocational experts do not, by themselves, overcome the presumption.

(4) Claimant's attorney fees.

Claimant submitted to the Administrative Law Judge, with his submission letter in the review and modification proceedings, a statement of time spent on the review and modification proceedings. He requested attorney fees at the time of the hearing and again in his submission letter. The Award was drafted by respondent's counsel and submitted to the Administrative Law Judge for signature. It does not mention the request for attorney fees.

The Appeals Board is reluctant to make a determination regarding the appropriateness of these fees without affording the parties an opportunity to have a hearing and to present any evidence they may wish to present on the issues relating to attorney fees. Accordingly, the Appeals Board will remand that aspect of this claim for decision by the Administrative Law Judge after affording the opportunity for hearing and presentation of evidence by both parties.

(5) The effective date of review and modification.

The Award submitted by respondent's counsel made the modification retroactive to the date claimant returned to work at a comparable wage, that is August 9, 1994. K.S.A. 1991 Supp. 44-528(d) provides that modifications are to be effective as of the date the change in disability occurred but in no event more than six months prior to the date of the application for review and modification. In this case the Application for Review and Modification was filed June 26, 1996, and, in accordance with the statutory provisions, the

modification could not be effective more than six months prior to that date or December 27, 1995.

Respondent argues that an exception should be made under the circumstances here. Respondent contends an exception is warranted because claimant concealed the fact that he returned to work in order to avoid a reduction in the workers compensation benefits. The Appeals Board considers the language of the statute clear and unambiguous, and we find no basis for an exception. Other remedies may be available if claimant intentionally or fraudulently concealed the fact of his return to work to obtain higher benefits. *See*, K.S.A. 44-5,120. Accordingly, the modification of the Award in this case should begin December 27, 1995.

(6) Average weekly wage.

In the Order Nunc Pro Tunc of January 27, 1997, the Administrative Law Judge reduced the average weekly wage by subtracting the value of fringe benefits. The Appeals Board had previously added the value of those fringe benefits to the wage as of the date they were terminated. The Order Nunc Pro Tunc deducted them as of the date claimant returned to work and began again to receive the same fringe benefits.

Claimant argues that the statute allows the value of the fringe benefits to be added once they are terminated but makes no reference to subtracting them once they are reinstated. The Appeals Board, however, agrees that they should be subtracted once they are reinstated. K.S.A. 1991 Supp. 44-511 provides:

> "Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration."

The intent of the statute was to include the value of those benefits only if and when they are not being provided by the employer. The first sentence of the above-quoted statute ends with the statement that the benefits are not to be included "unless such remuneration is discontinued." In our view, the remuneration is no longer discontinued once the benefits are reinstated. The Appeals Board, therefore, agrees with and affirms the finding stated in the Review and Modification Award that the average weekly wage should be $448.70.

(7) Whether the Order Nunc Pro Tunc prepared and submitted to the Administrative Law Judge ex parte by respondent's counsel is effective against the claimant.

As previously indicated, the Review and Modification Award was drafted by respondent's counsel and submitted to the Administrative Law Judge for signature. The

initial version calculated benefits based upon Romeo. After the Administrative Law Judge had signed and issued the decision, the respondent determined that this was an inappropriate calculation for a date of accident prior to July 1, 1993. Respondent therefore submitted an amended version, labeled an Order Nunc Pro Tunc, which changed the calculation to an appropriate one. The amended version also reflected the change in average weekly wage. Claimant's counsel indicates he was afforded no notice that such an order was being prepared and submitted and no opportunity to be heard. The Appeals Board agrees that this procedure is inappropriate. It was inappropriate both because it was done ex parte and because the changes were not the type of corrections intended to be addressed in a nunc pro tunc order. The Appeals Board finds, however, that the amendments made by the ex parte order were appropriate ones, ones which would have been made by the Appeals Board had they not been made otherwise. We note claimant disagrees with the decision to subtract the value of the fringe benefits as discussed above but does not dispute the accuracy of the value of those benefits as reflected in the Order Nunc Pro Tunc. Therefore, even if we treat the Order Nunc Pro Tunc as void, the same result obtains from the appeal of the original Review and Modification Award.

(8) Whether the Workers Compensation Fund should be required to reimburse respondent for overpayment.

Respondent argues that it has made an overpayment from the date the claimant returned to work at a comparable wage to the effective date of this modification. Respondent contends that the Workers Compensation Fund should be required to reimburse respondent for that overpayment.

The Appeals Board finds no statutory basis for such a reimbursement.

WHEREFORE, the Appeals Board finds that the Review and Modification Award of Administrative Law Judge John D. Clark entered November 6, 1996, and amended by the Order Nunc Pro Tunc entered January 27, 1997, should be modified.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Review and Modification Award entered by Administrative Law Judge John D. Clark, dated November 6, 1996, should be, and is hereby, modified.

Wherefore, the original award of compensation entered in this case by the Appeals Board on February 29, 1996, is hereby modified by changing the average weekly wage to $748.70, the disability changed to 6% permanent partial general disability, and the weekly rate changed to $29.95, all changes effective December 27, 1995. From and after December 27, 1995, there would remain 222.14 weeks to be paid at $29.95 per week for a total of $6,653.09. Any overpayment made for the period after December 27, 1995, the effective date of the modification, may be credited toward future payments.

The modification will reduce the total award from $100,000 to $52,582.00.

The issues relating to attorney fees are remanded to the Administrative Law Judge for his determination.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Wichita, KS
Frederick L. Haag, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director